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Supreme Court, U.S.
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No. 04-308

In the Supreme Court of the United States

MARTIN PRUITT, LUCRETIA PRUITT, DAVID ELGIN, DANIEL LLEWELLYN AND CHERYL LLEWELLYN,
Petitioners,

v.

COMCAST CABLE HOLDINGS, LLC,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The United States Court of Appeals for the Tenth Circuit created a new standard under the Cable Communications Policy Act, 47 U.S.C. § 521 *et. seq.* (the "Cable Act"), whereby information about a cable subscriber's viewing habits is not considered to be "personally identifiable information," even though it is possible to identify the person to whom the information relates, if the subscriber's name and address is stored in a separate location from the information revealing his viewing habits. This standard, which is not found in the Cable Act, serves to nullify every privacy protection contained therein by allowing cable companies to easily circumvent those protections. The Respondent, however, attempts to recast the issues submitted for review. In such regard, the Respondent cites from a document, which was not before this Court, in order to falsely portray the information at issue as being "merely a series of numbers." (Opposition, p. i., Question Presented).

The full text of the document cited by the Respondent, establishes that the information at issue in this case is not "merely" a series of numbers. Instead, the document verifies that the Respondent's cable converter boxes keep records of every pay-per-view channel watched by its subscribers. The fact, however, that the Respondent is able to use the Court of Appeals' opinion to argue that the term "personally identifiable information" does not include particular subscribers' viewing habits, confirms that the opinion nullifies the privacy protections afforded by the Cable Act.

Congress emphasized the importance of protecting the privacy of cable subscribers in passing national cable legislation. H.R.Rep. No. 934, 98th Cong., 2d Sess. 29 (1984) U.S.Code Cong. & Admin. News 1984, p. 4667.

Unless the Supreme Court acts to correct the Court of Appeals' ruling, the privacy protections of the Cable Act will have no effect, and the cable industry will have been given free reign to violate the privacy of all of its subscribers.

ARGUMENTS IN REPLY

I. THE FULL DOCUMENT RELIED UPON BY THE RESPONDENT ESTABLISHES THAT ALL ELECTRONIC INFORMATION CAN BE REPRESENTED AS A SERIES OF NUMBERS, AND THAT THE INFORMATION AT ISSUE HEREIN REVEALS A CABLE SUBSCRIBER'S VIEWING HABITS.

The Respondent quotes from a document which was not before this Court, in an apparent effort to make the information stored in its converter boxes appear to be a meaningless series of numbers. In order to correct the misconception created by the Respondent, the Petitioners have included a full copy of the document in the supplemental appendix attached hereto. See Appendix 1, 1b - 9b. The document is a declaration of the Respondent's expert witness and employee, Kevin Taylor. App. 1b - 2b, paras. 3 and 4. Viewed in its entirety, the document negates the Respondent's arguments. In such regard, the declaration establishes the following facts:

- All electronic data consists of a series of zeros and ones, known as binary numbers. App. 2b, para. 9.

- Electronic devices are commonly programmed to represent binary data as a series of letters and numbers, known as hexadecimal format. App. 2b, para. 10.

- Stored in the memory of each converter box is the total number of pay-per-view purchases made through the box, App. 3b, para. 13, the start time of each purchased pay-per-view movie or event, App. 3b, para. 16a, and the pay-per-view channel on which each purchased movie or event was carried, App. 3b, para. 16b.[1]

In other words, there is nothing unique about the information at issue in this case. Any and all electronic information consists of a series of ones and zeroes, and, therefore, can be represented in hexadecimal format. This includes any information which could be collected or stored by any cable system or which could be stored in the computer systems of any cable company. The fact that the electronic information at issue in this case can be printed out in a hexadecimal format does not mean that it is a meaningless series of numbers. To the contrary, as shown by the declaration, regardless of the format in which it is printed, the information in the converter boxes reveals how many pay-per-view programs a subscriber watched, what channels he watched, and when he watched them. App. 3b, paras. 13 and 16.

II. THE RESPONDENT'S ARGUMENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI ARE NOT VALID.

The Respondent argues that the Petitioners have overstated the impact of the Court of Appeals' opinion, and that the opinion is fact specific. This is refuted by a simple example.

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[1] Paragraph 16 of the declaration, App. 3b, directly contradicts the Respondent's disingenuous claim that the information does not reveal dates, times or channels watched. See Opp. p. 3, fn 1.

47 U.S.C. § 551(b) of the Cable Act is solely directed to the use of a cable system to collect personally identifiable information. Since, by its very nature, a cable system is electronic, any information which it can collect can be represented in a hexadecimal format. Under the Respondent's analysis, such information would simply be a series of numbers and, therefore, could not be personally identifiable information. As such, § 551(b) would have absolutely no valid application. In fact, as noted above, this same logic applies to any information stored in either a cable system or a cable company's computers. It is difficult to see how the Petitioners could have overstated the impact of the Court of Appeal's opinion, when the application of the Respondent's own interpretation of that opinion would nullify every privacy protection afforded by the Cable Act.

The Respondent also unsuccessfully attempts to resolve the conflict between the Court of Appeal's ruling and the opinion in *Metrovision of Livonia, Inc. v. Wood*, 864 F.Supp. 675 (E.D. Mich. 1994). In *Metrovision*, the court listed "information showing that a particular subscriber watches three hours of the Playboy Channel every night followed by two hours of a pay-per-view Wrestlemania contest" as an example of personally identifiable information. *Id.*, at 681, fn. 3. If a cable subscriber watched these exact same shows on the Respondent's cable system, the converter boxes in the subscriber's home would keep a record of each show, App. 3b, para. 13, and would record exactly what channels were watched, App. 3b, para. 16a, and when they were watched, App. 3b, para. 16b. Moreover, since the information in the example in *Metrovision* would have been electronic, it too could have been represented in a hexadecimal format. App. 2b, paras. 9 and 10.

Finally, the Respondent misconstrues the Petitioners' position regarding the additional requirements imposed by the Court of Appeals. Contrary to the Respondent's argument, the Court of Appeals specifically held that, absent any allegation that retention of data in the billing system violates the Cable Act, the information in the converter boxes is not personally identifiable. App. 7a. As discussed in the Petition, such data involves subscribers' names and addresses, which are validly kept for billing purposes. Names and addresses, however, do not reveal a subscriber's viewing habits. The information which reveals viewing habits is stored in the converter boxes, and can be matched to legitimate records in the billing system in order to identify the subscriber to which the pay-per-view information relates. It is simply not a violation of the Cable Act for a cable company to maintain its customers' names and addresses for billing purposes, and any allegation to the contrary could not have been made in good faith. The result of the Court of Appeals' ruling is, that so long as a cable company stores identifying information in its billing computers, it is free to use its cable system to peer in on its customers and collect and store absolutely any personal information about them, including information on bank transactions, shopping habits, political contributions, viewing habits and any other significant personal decisions. *See Scofield*, 973 F.2d at 876 (quoting H.R.Rep. No. 934, 98th Cong., 2d Sess. 29 (1984) U.S.Code Cong. & Admin. News 1984, p. 4666).

CONCLUSION

For the reasons as stated above, and in the Petition for Writ of Certiorari, the Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 00-WM- 1250

MARTIN PRUITT, LUCRETIA PRUITT,)
DAVID ELGIN, DANIEL LLEWELLYN)
and CHERYL LLEWELLYN,)
Plaintiffs,)
)
v.)
)
AT&T BROADBAND, LLC,)
Defendant.)
)

DECLARATION OF KEVIN TAYLOR

I, Kevin Taylor, hereby state under oath as follows:

1. I am over the age of eighteen years and competent to testify.

2. I have personal knowledge of the facts stated herein.

3. I am employed by AT&T Broadband, LLC ("AT&T Broadband"). I have extensive knowledge of and experience with the Motorola DCT converter boxes at issue in this case.

4. I previously provided a written expert report, and twice gave deposition testimony in this case.

5. To gather information to support AT&T Broadband's position in this case, AT&T Broadband recently attempted to poll the converter box in the home of Mr. David Elgin, who is one of the plaintiffs in this case. However, Mr. Elgin's converter box did not respond, so no Pay-Per-View ("PPV") purchase data could be retrieved from his box. The fact that the box is not responding most likely is because it was disconnected from the telephone line.

6. After it was determined that Mr. Elgin's converter box was not responding, AT&T Broadband obtained PPV purchase information from a test converter box. That data was not received until January 15, 2002.

7. Attached hereto as Exhibit A is a true and correct copy of the PPV purchase data that was obtained from the test converter box.

8. The Exhibit A data is an example of the type of data that is stored in the electronic memory of the Motorola converter boxes concerning PPV purchases made by digital cable subscribers in Colorado.

9. Like all electronic data, the data stored in the converter boxes, at its most basic level, is a series of zeros and ones (binary numbers).

10. Electronic devices commonly are programmed to represent binary data in hexadecimal format (a series of letters and numbers). On Exhibit A, each pair of letters and/or numbers (e.g., 06, 3A, 9B, 28, etc.) represent a string of eight zeros and ones or one byte of data.

11. The diagnostics program that runs within the converter boxes at issue in this case was programmed by Motorola to display the areas of memory containing PPV purchase data in hexadecimal format.

12. The Exhibit A data is displayed in hexadecimal format. This is the format of the data as it was delivered out of the test converter box.

13. The "View History Queue Header" data on Exhibit A, to the best of my knowledge, includes the total number of PPV purchases made through this converter box.

14. The "VH Queue DebitAuthData" data on Exhibit A, to the best of my knowledge, is a digital authentication that is part of the security protocol.

15. The "Purchase Report Acknowledge Array" data on Exhibit A is a record of which PPV purchases were reported back to the billing system in response to a particular polling request.

16. The "Entries 0 to 7" on Exhibit A are the PPV purchase data stored in the electronic memory of the test converter box. This data relates to eight PPV purchases. This data consists of:

a. The start time of each purchased PPV movie or event, which is a number representing the number of seconds since January 1, 1970; and

b. The source identifier, which is a number representing which PPV channel each purchased PPV movie or event was carried

on. For example, the source identifier for In-Demand 1 is a number such as 1001.

17. The zeroes in entries 8 through 63 reflect that this converter box has only processed eight PPV purchases and there are no other entries.

18. The digital cable converter boxes in use in Colorado do not collect, transmit, receive or store subscribers' names, addresses, account numbers or other personal identifying information.

19. Each digital cable converter box in use in Colorado has a unique number representing its unit address or unit number. The unit number is stored in another area of memory in the converter box, and therefore is not included in the data on Exhibit A.

20. The data stored in the converter boxes is not associated with a subscriber's account unless and until the data has been transmitted from the converter box through the Headend Management System ("HMS") and the Access Control System ("AC") to AT&T Broadband's billing system. The billing system is the only place where the PPV purchase data from the converter box is combined with a subscriber's name, address and account number.

I hereby declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

/s/_____

Kevin N. Taylor

Date: January 17, 2002

EXHIBIT A

History Queues.txt

06.73> Q
------View History Queue Header:
01 03 08 07 07 00 99 01 00 00 00 08 01 03 08 07
07 00 99 01 00 00 00 08 9A 9A 00 00 02 3A CE 29
5B A9 68 3A CE 00 00 00 00 00 00 00 00 00 00 00
97 00 3C ED 78 E4 75 63 DE 59 00 00 10 5C 00 00
08 B3 00 04 00 00 72 04 00 00 48 00 06 3A 9B 26
1C E0

------VH Queue DebitAuthData:
3C ED 78 E4 75 63 DE 59 00 00 10 5C 00 00 08 B3
00 04 00 00 72 04 00 00 48 00

------Purchase Report Acknowledge Array
1A 54 07 00 1A 56 07 00 1A 3E 07 00 1A 41 07 00
1A 45 07 00 1A 48 07 00 1A 4B 07 00 1A 4F 07 00

------Entries 0 to 7:
06 3A 9B 26 1C E0 28 3A 9B 00 62 21 C4 33 63 BB 5D 16
0E 62 6D 00 06 3A 98 27 5B F9 38 3A 98 00 B8 9A DF 45
8B 4A F2 0B 15 28 95 00 02 3A 9B 28 42 93 98 3A 9B 00 00
00 00 00 00 00 00 00 15 AF 09 00 02 3A B5 28 4A 13 20 3A
B5 00 00 00 00 00 00 00 00 00 15 D1 66 00 02 3A A8 28 4B
F1 40 3A A8 00 00 00 00 00 00 00 00 00 1A 20 E3 00 02 3A
AF 29 56 40 40 3A AF 00 00 00 00 00 00 00 00 00 1A 23 47
00 02 3A A7 29 57 AD E0 3A A7 00 00 00 00 00 00 00 00 00
00 1A 2D 1E 00 02 3A CE 29 5B A9 68 3A CE 00 00 00 00
00 00 00 00 00 1A 56 97 00

------Entries 8 to 15:

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------Entries 16 to 23:

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History Queues.txt

------Entries 24 to 31:

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------Entries 32 to 39:

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------Entries 40 to 47:

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------Entries 48 to 55:

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------Entries 56 to 63:
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